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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS EDGAR DOUGLAS,

Defendant and Appellant.

C059028

(Super. Ct. No.
07F1394)

Defendant Thomas Edgar Douglas pled guilty to felony possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and admitted to having a prior "strike" conviction within the meaning of the "three strikes" law (Pen. Code, § 1170.12).¹ Pursuant to the plea agreement, the trial court suspended imposition of sentence for a period of three years, placed defendant on probation under Proposition 36 (Pen. Code, § 1210 et seq.), and imposed various fines and fees. Following two probation violations, the trial court revoked defendant's grant of probation and ordered him to return for sentencing.

¹ All further statutory references are to the Penal Code.

Defendant's subsequent motion to dismiss his prior strike conviction under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) was denied. The trial court sentenced defendant to six years in state prison (the upper term of three years, doubled pursuant to the three strikes law), and imposed other orders.

On appeal, defendant contends (1) application of the three strikes law in this case violates the federal and state constitutional bans against cruel and/or unusual punishment, (2) the trial court abused its discretion by refusing to strike defendant's prior strike conviction, and (3) trial counsel's failure to bring a section 17 motion to reduce the present offense from a felony to a misdemeanor rendered the representation ineffective. We disagree with each contention and will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Nature and Circumstances of the Present Offense

In January of 2007 defendant was in a vehicle stopped by officers of the Anderson Police Department. Defendant granted one of the officers permission to search his person. A silver-colored cylinder containing .05 gram of methamphetamine was found in defendant's right front pocket.

As already indicated, pursuant to a negotiated plea agreement, defendant pled guilty to felony possession of methamphetamine and admitted to having a prior strike conviction in exchange for a grant of probation under Proposition 36. Defendant's first probation violation occurred in June 2007 when

he failed to report to the probation department as mandated by the terms of his probation. Defendant admitted the violation, and probation was revoked and then reinstated. Defendant's second probation violation occurred in October 2007 when he again failed to report to the probation department; failed to inform the probation department of a change of address; was discharged from his substance abuse treatment program for failure to attend the mandated treatment; and, while being arrested on a felony bench warrant, resisted arrest, necessitating the use of a Taser. Defendant again admitted the violation and the trial court revoked his probation.

Defendant's Prior "Strike" Conviction and Criminal History

In July 1992, while in prison for receiving stolen property, defendant was convicted of voluntary manslaughter (§ 192, subd. (a)) and sentenced to 12 years in prison. In May of the following year, while still in prison, defendant was convicted of possession of a controlled substance (§ 4573.6) and sentenced to one year in prison. After being released on parole, defendant violated the terms of his parole in November 1997, October 1998, October 1999, March 2000, June 2001, and September 2001. To his credit, defendant was not charged with or convicted of any crimes between September 2001 and January 2007.

Defendant's Motion to Strike His Prior Strike Conviction

Following revocation of probation, defendant moved the trial court to dismiss his prior strike conviction under *Romero*, *supra*, 13 Cal.4th 497. Defendant argued that the minor nature

of the present felony (simple possession of .05 gram of methamphetamine, which is also punishable as a misdemeanor) and the remoteness in time of the prior strike conviction (July 1992) rendered defendant outside the spirit of the three strikes law. Defendant further argued that application of the three strikes law in this case would violate the federal and state constitutional bans against cruel and unusual punishment.

The People opposed defendant's *Romero* motion, arguing that his voluntary manslaughter conviction was "not so remote" as to pull defendant outside the spirit of the three strikes law, especially since he was subsequently convicted of possession of a controlled substance while in prison and, following his release, violated parole on six separate occasions. The People also pointed out that with respect to defendant's present offense, he not only violated his grant of probation multiple times but also resisted arrest, prompting the use of a Taser.

Trial Court's Ruling on the Motion

The trial court denied defendant's motion to strike his prior strike conviction. As the court explained its ruling: "The nature of the current offense, possession of .05 grams of methamphetamine is not a terrible violation of law. However, the nature of the strike, [a] very serious violation of Penal Code Section 192(a), felony manslaughter, for which he was sentenced to prison. And though the conviction was 16 years ago, he does appear to have an on-going criminal history, including a previous [receiving stolen property conviction] for which he was sentenced to prison[.] [W]hile he was in

[prison] . . . he was in possession of controlled substances, got an additional year, and then he continued with basically nonstop violations of parole, placed on probation here, and he fails to report. He absconds for a significant period of time. He doesn't obtain treatment. He violates the law again by resisting, interfering or obstructing an officer when he was getting arrested. All of those reasons would not in any fashion justify striking the strike. [¶] Based on the long criminal history and serious offenses and violations of parole and probation, the request to strike the strike is denied."

DISCUSSION

I. CRUEL AND/OR UNUSUAL PUNISHMENT

Defendant contends that application of the three strikes law in this case violates the federal and state constitutional bans against cruel and/or unusual punishment. Defendant is mistaken.

A. The United States Constitution

The Eighth Amendment to the United States Constitution, made applicable to the states via the Fourteenth Amendment, proscribes "cruel and unusual punishments" and "contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'" (*Ewing v. California* (2003) 538 U.S. 11, 20 [155 L.Ed.2d 108] (*Ewing*), quoting *Harmelin v. Michigan* (1991) 501 U.S. 957, 996-997 [115 L.Ed.2d 836] (*Harmelin*); *Lockyer v. Andrade* (2003) 538 U.S. 63, 72 [155 L.Ed.2d 144].) While this proportionality principle "'does not require strict proportionality between crime and sentence,'" it does prohibit

"'extreme sentences that are "grossly disproportionate" to the crime.'" (Ewing, *supra*, 538 U.S. at p. 23, quoting Harmelin, *supra*, 501 U.S. at p. 1001.)

This proportionality analysis requires consideration of three objective criteria: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." (Solem v. Helm (1983) 463 U.S. 277, 292 [77 L.Ed.2d 637].) However, in a noncapital case, a successful proportionality challenge will be "'exceedingly rare'" (Ewing, *supra*, 538 U.S. at p. 21, quoting Hutto v. Davis (1982) 454 U.S. 370, 374, [70 L.Ed.2d 556]), and it is only in the rare case where a comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality that the second and third criteria come into play (Harmelin, *supra*, 501 U.S. at p. 1005 (conc. opn. of Kennedy, J.)).

In *Ewing*, the Supreme Court upheld a three strikes prison term of 25 years to life after the defendant committed grand theft by shoplifting three golf clubs, having been convicted previously of four serious or violent felonies. (Ewing, *supra*, 538 U.S. at pp. 17-20.) As Justice O'Connor explained in her lead opinion, "[r]ecidivism has long been recognized as a legitimate basis for increased punishment." (*Id.* at p. 25.) In considering the gravity of the offense, the high court looked not only to Ewing's current felony, but also to his long criminal felony history, stating "[a]ny other approach would

fail to accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions. In imposing a three strikes sentence, the State's interest is not merely punishing the offense of conviction . . . '[i]t is in addition the interest . . . in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law.' [Citation.]" (*Id.* at p. 29.)

Similarly, in *People v. Meeks* (2004) 123 Cal.App.4th 695 (*Meeks*), we upheld a three strikes prison term of 25 years to life where the defendant failed to register as a sex offender within five days of his birthday and within five days of changing his address, having been convicted previously of four serious or violent felonies. (*Id.* at pp. 699-700.) Applying the proportionality test of *Ewing*, we concluded that "defendant's sentence of 25 years to life in prison for failing to register cannot be considered a sentence that is grossly disproportionate to his crime in light of his long and serious criminal history." (*Id.* at p. 708.) As we explained:

(1) Meeks received the same sentence of 25 years to life that was upheld in *Ewing*; (2) the crime of failing to register as a sex offender is "at least as serious as theft of three golf clubs," which triggered the three strikes sentence in *Ewing*; and (3) a term of 25 years to life is not grossly disproportionate to the crime of failing to register when viewed in light of Meeks's "history of repeated violations of the criminal law that spanned at least 30 years." (*Id.* at pp. 708-709.)

In this case, defendant received a sentence of six years for possession of .05 gram of methamphetamine. While admittedly a harsh sentence, it is far less severe than the term of 25 years to life imposed upon the defendants in *Meeks* and *Ewing* for failure to register as a sex offender and the theft of three golf clubs, respectively. Moreover, while six years in prison may very well be grossly disproportionate to the crime of possession of .05 gram of methamphetamine *by someone without a serious and/or violent criminal history*, we must also take into account our Legislature's legitimate interest "in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law.'" (*Ewing, supra*, 538 U.S. at p. 29.) Here, defendant has shown such an inability to abide by the criminal law.

Defendant's reliance on *People v. Carmony* (2005) 127 Cal.App.4th 1066 is misplaced. There, we held that a three strikes sentence of 25 years to life for "an entirely passive, harmless, and technical violation of the registration law" was "grossly disproportionate to the gravity of the offense." (*Id.* at p. 1077.) Here, possession of methamphetamine, even the small amount involved in this case, is neither passive, harmless, nor a mere technical violation of the law. Nor was defendant sentenced to a prison term of 25 years to life. When viewed in light of defendant's criminal history, as we must, we cannot find that a six-year prison commitment is grossly

disproportionate to the offense of possession of .05 gram of methamphetamine.

B. California Constitution

The California Constitution prohibits "cruel or unusual punishment." (Cal. Const., art. I, § 17, *italics added*.) A punishment may violate the California Constitution "although not cruel or unusual in its method, [if] it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*).) Our Supreme Court in *Lynch* described three "techniques" the courts have used to administer this rule: (1) an examination of the "nature of the offense and/or the offender, with particular regard to the degree of danger both present to society" (*id.* at p. 425); (2) a comparison of the challenged penalty with the punishments prescribed for more serious offenses in the same jurisdiction (*id.* at p. 426); and (3) "a comparison of the challenged penalty with the punishments prescribed for the same offense in other jurisdictions having an identical or similar constitutional provision" (*id.* at p. 427, *italics omitted*).

With respect to the first *Lynch* technique, the offense of possession of .05 gram of methamphetamine is relatively minor in nature. However, we must also take into consideration the nature of the offender. As already indicated, defendant was convicted of voluntary manslaughter while in prison for receiving stolen property, subsequently convicted of possession of a controlled substance while in prison on the manslaughter

conviction, violated the terms of parole on six separate occasions, was convicted of possession of methamphetamine in this case, and resisted arrest when taken into custody following two violations of probation. "As under the federal standard, a defendant's history of recidivism, which is part of the nature of the offense and the offender, justifies harsh punishment." (*Meeks, supra*, 123 Cal.App.4th at p. 709; see *People v. Cooper* (1996) 43 Cal.App.4th 815, 823-825; *People v. Weaver* (1984) 161 Cal.App.3d 119, 125-126.)

Regarding the second *Lynch* technique, a comparison of the challenged penalty with the punishments prescribed for more serious offenses in the same jurisdiction, defendant points out that his six-year sentence for simple possession of methamphetamine, *with a prior strike conviction*, is greater than punishments for more serious offenses, such as possession of methamphetamine with intent to sell or possession of methamphetamine while also in possession of a loaded firearm, *without the prior strike conviction*. However, defendant's comparison does not take into account his criminal history. His punishment is no more severe than that prescribed for more serious offenses in California, *committed by an offender with a similar criminal history*.

Finally, with respect to the third *Lynch* technique, as defendant offers no comparison of the challenged penalty with the punishments prescribed for the same offense in other jurisdictions having an identical or similar constitutional provision, "[w]e simply note California's Three Strikes scheme

is consistent with the nationwide pattern of substantially increasing sentences for habitual offenders.' [Citation.]" (*People v. Ruiz* (1996) 44 Cal.App.4th 1653, 1665 [two-strike sentence of 30 years to life for second degree murder not cruel and/or unusual punishment].)

Defendant "has failed to show that this case and this defendant is that 'exquisite rarity' [citation], an instance of punishment which offends fundamental notions of human dignity or which shocks the conscience." (*People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1631.)

II. MOTION TO DISMISS THE PRIOR STRIKE CONVICTION

Defendant next contends that the trial court abused its discretion by refusing to strike his prior strike conviction under *Romero*. Not so.

Under section 1385, subdivision (a), a "judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed." In *Romero, supra*, 13 Cal.4th 497, our Supreme Court held that a trial court may utilize section 1385, subdivision (a) to strike or vacate a prior strike conviction for purposes of sentencing under the three strikes law, "subject, however, to strict compliance with the provisions of section 1385 and to review for abuse of discretion." (*Romero*, at p. 504.) Similarly, a trial court's "failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*).)

In *Carmony*, our Supreme Court explained: "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.'" [Citation.] Second, a "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'" [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Carmony, supra*, 33 Cal.4th at pp. 376-377.)

The court went on to explain that "the Three Strikes law does not offer a discretionary sentencing choice, as do other sentencing laws, but establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court "conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme.'" [Citation.]" (*Carmony, supra*, 33 Cal.4th at p. 377.) The court then quoted *People v. Williams* (1998) 17 Cal.4th 148, 161 for the proper standard for reviewing

a decision to strike a prior conviction "in furtherance of justice" pursuant to section 1385: "[T]he court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.'" (*Carmony, supra*, 33 Cal.4th at p. 377.)

The three strikes law "creates a *strong presumption* that any sentence that conforms to these sentencing norms is both rational and proper." (*Carmony, supra*, 33 Cal.4th at p. 378, italics added.) This presumption will only be rebutted in an "extraordinary case -- where the relevant factors described in *Williams, supra*, 17 Cal.4th 148, manifestly support the striking of a prior conviction and no reasonable minds could differ." (*Carmony, supra*, 33 Cal.4th at p. 378.)

In this case, we cannot find that the trial court abused its discretion by declining to strike the prior conviction. With respect to the nature and circumstances of the present offense, as the trial court explained, possession of .05 gram of methamphetamine is not a "terrible violation of law." With respect to the nature and circumstances of defendant's prior strike conviction, as noted by the trial court, felony manslaughter is a "very serious violation" of the criminal law. And while this prior conviction was 16 years old, the trial

court pointed out that defendant's background, character, and prospects for the future indicate "an on-going criminal history." As already indicated, defendant was convicted of voluntary manslaughter while in prison for receiving stolen property, and was subsequently convicted of possession of a controlled substance while in prison. Following his release, he violated the terms of parole six times. After a grant of probation in this case, defendant violated the conditions of probation on two separate occasions and resisted arrest while being taken into custody. These considerations do not manifestly support the striking of defendant's prior conviction such that no reasonable minds could differ. (*Carmony, supra*, 33 Cal.4th at p. 378.)

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant's final contention is that trial counsel's failure to bring a section 17 motion to reduce the present offense from a felony to a misdemeanor rendered the representation ineffective. Again, we disagree.

A criminal defendant has the right to the assistance of counsel under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215 (*Ledesma*).) This right "entitles the defendant not to some bare assistance but rather to *effective* assistance. [Citations.] Specifically, it entitles him to 'the reasonably competent assistance of an attorney acting as his diligent conscientious advocate.' [Citations.]" (*Ibid.*, quoting *United States v.*

De Coster (D.C.Cir. 1973) 487 F.2d 1197, 1202.) The ineffective assistance of counsel test has two parts. First, we must determine whether counsel's performance was deficient. Then, we must determine whether prejudice resulted from counsel's deficient performance. (*Ledesma*, at pp. 216-217; accord, *Strickland v. Washington* (1984) 466 U.S. 668, 687, 691-692.) Only if both questions are answered affirmatively is relief warranted.

"In determining whether counsel's performance was deficient, a court must in general exercise deferential scrutiny." (*Ledesma*, *supra*, 43 Cal.3d at p. 216.) The burden of proving a claim of inadequate assistance of counsel is squarely upon the defendant. (*People v. Camden* (1976) 16 Cal.3d 808, 816-817.) To establish counsel's actions were deficient, defendant must show that "trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates." (*People v. Pope* (1979) 23 Cal.3d 412, 425, overruled on other grounds in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) The appellate court looks to the record for any explanation for the challenged aspect of representation. If an explanation exists in the record, the court must determine whether the record demonstrates that counsel was reasonably competent and acting as a conscientious, diligent advocate. When the record does not contain an explanation, unless counsel was asked for an explanation and failed to provide one or there simply could be

no satisfactory explanation, the judgment must be affirmed on appeal. (*Pope, supra*, 23 Cal.3d at pp. 425-426.) This prevents appellate courts from engaging "in the perilous process of second-guessing." (*People v. Miller* (1972) 7 Cal.3d 562, 573.) Accordingly, courts "'reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.'" [Citation.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 980.)

In this case, after defendant pled guilty to felony possession of methamphetamine in exchange for a grant of Proposition 36 probation, and then squandered that opportunity by violating the terms of his probation, his trial counsel moved the court to dismiss his prior strike conviction but did not move the court to reduce the offense from a felony to a misdemeanor under section 17, subdivision (b).² However, in defendant's written *Romero* motion, counsel concludes with the following statement: "This is a simple possession case of methamphetamine which weighed .05 grams and would have been

² Section 17, subdivision (b) provides in relevant part: "When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances: [¶] . . . [¶] (3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor."

subject to a [section] 17(b) motion except for his prior criminal history.”

Counsel’s legal assessment as to the unavailability of a section 17, subdivision (b) motion was erroneous. Notwithstanding the three strikes law, a trial court possesses the discretion under section 17, subdivision (b) to reduce a “wobbler” -- an offense that may be sentenced alternatively as a felony or a misdemeanor -- from a felony to a misdemeanor following a grant of probation. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 973-976 [defendant convicted of possession of .41 gram of methamphetamine and admitted to having four prior serious felony convictions; notwithstanding the three strikes law, it was not abuse of discretion for trial court to reduce the offense to a misdemeanor]; § 17, subd. (b)(3).)

However, the fact that defense counsel could have moved to reduce the offense from a felony to a misdemeanor does not mean that counsel had no tactical motive for choosing not to do so. Counsel could reasonably have concluded that such a motion would have been a futile gesture. Counsel is not required to undertake futile acts, or file meritless motions, simply to withstand later claims of ineffective assistance. (*People v. Anderson* (2001) 25 Cal.4th 543, 587; *People v. Hines* (1997) 15 Cal.4th 997, 1038, fn. 5.) We must remember that defendant’s conviction in this case arose out of a plea agreement wherein defendant pled guilty to *felony* possession of methamphetamine and admitted to having a prior strike conviction in exchange for probation under Proposition 36. Defendant received the benefit

of his negotiated plea, despite having squandered it away by violating the terms of his probation. The benefit to the People is that defendant pled guilty to a *felony* and admitted the strike. While the trial court could have reduced the felony to a misdemeanor under section 17, subdivision (b), to have done so would have deprived the People of one of the benefits of the plea agreement. Accordingly, we find it extremely unlikely that the court would have granted such a motion had one been brought.

In sum, we do not believe trial counsel acted deficiently by failing to bring a motion he could reasonably have concluded would have been futile. Nor was there any prejudice as it is highly improbable that such a motion would have been granted. (See *Ledesma, supra*, 43 Cal.3d at pp. 216-217.)

DISPOSITION

The judgment is affirmed.

RAYE, J.

We concur:

BLEASE, Acting P.J.

ROBIE, J.